



CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU HAWAII

No. 93-367

RESOLUTION

TO AUTHORIZE THE CITY AND COUNTY OF HONOLULU TO INDEMNIFY CERTAIN EMPLOYEES AND OFFICERS OF THE CITY.

WHEREAS, Section 2-101 of the Revised Charter of the City and County of Honolulu 1973, as amended (the "Revised Charter"), provides, in pertinent part, that the "city shall have and may exercise all powers necessary for local self-government" and that "the city shall have and may exercise all powers it would be competent for [the] charter to enumerate expressly"; and

WHEREAS, pursuant to Section 5-203 of the Revised Charter, the Department of the Corporation Counsel is obligated to defend employees and officers of the City in matters relating to their official powers and duties; and

WHEREAS, pursuant to said Revised Charter section, the Department of the Corporation Counsel is required to determine whether the subject matter of the lawsuit relates to the official powers and duties of the employees and officers of the City, unless otherwise provided by federal or state law; and

WHEREAS, the Department of the Corporation Counsel has traditionally defended employees and officers of the City unless it has determined that an actual conflict of interest existed, which would require disqualification under the Hawaii Code of Professional Responsibility; and

WHEREAS, traditionally, the mere allegation of punitive or exemplary damages in a civil complaint did not necessarily result in a determination by the Department of the Corporation Counsel that it was disqualified from representing employees and officers of the City; and

WHEREAS, prior advisory opinions from the Office of Disciplinary Counsel, State of Hawaii, have validated the Department of the Corporation Counsel's practice of determining ethical conflicts of interest on a case-by-case basis; and

WHEREAS, a September 17, 1993 advisory opinion from the Office of Disciplinary Counsel, State of Hawaii, stated in relevant part that:

It is my office's opinion that [the Department of the Corporation Counsel] would be ethically precluded from continuing to represent the individual [employees and officers] unless the City can and will indemnify

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them for any punitive damages awarded in the event of an adverse decision in the . . . lawsuit.

and

WHEREAS, in lawsuits filed against employees and officers of the City, counsel for plaintiffs often allege punitive or exemplary damages against said individual employees and officers as a matter of course; and

WHEREAS, historically, despite such routine allegations in the pleadings, punitive damages rarely have been assessed against employees and officers of the City; and

WHEREAS, in the event special counsel is required to represent employees and officers based upon the mere allegation of punitive damages against them, the City would be required to pay for such legal services and any costs associated therewith; and

WHEREAS, the City Council has determined that the legal services and any costs associated therewith would be prohibitive; and

WHEREAS, the City Council is also concerned that malicious, willful, wanton, oppressive, or criminal acts of employees and officers should not be condoned or encouraged; and

WHEREAS, after considering the need to conserve public funds and the need to discourage grossly improper behavior of City employees and officers, the City Council has decided to adopt the following procedure:

a) Pursuant to Section 5-203 of the Revised Charter, the Department of the Corporation Counsel shall determine whether a City employee or officer is entitled to a defense to be provided by the City in a lawsuit, unless otherwise provided by federal or state law;

b) The Department of the Corporation Counsel shall determine, on a case-by-case basis, whether a City employee, as defined in Section 13-101.3 of the Revised Charter, and the City police chief (who is named as a matter of course in almost every lawsuit involving City police officers), shall be entitled to

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indemnification by the City from any compensatory or punitive damages assessed against such employee in the lawsuit; and

c) The City Council, upon recommendation by the Department of the Corporation Counsel, shall determine, on a case-by-case basis, whether a City officer (except the City police chief), as defined in Section 13-101.4 of the Revised Charter, and the City prosecuting attorney, shall be entitled to indemnification by the City from any compensatory or punitive damages assessed against such officer in the lawsuit;

and

WHEREAS, under this procedure, once the City has an obligation to defend, the Department of the Corporation Counsel would undertake representation of the employee or officer if the decision is to indemnify despite allegations of punitive damages, but the Department of the Corporation Counsel would seek the appointment of special counsel to defend the employee or officer if the decision is not to indemnify; and

WHEREAS, the City Council deems it prudent to require that, where the Department of the Corporation Counsel or the City Council determines that a City employee or officer is entitled to indemnification by the City, the employee or officer shall have a continuing duty to reasonably cooperate in good faith with the City in its defense of the lawsuit; and

WHEREAS, the City Council further finds it prudent to provide that an employee's or officer's failure to reasonably cooperate in good faith with the City in its defense of the lawsuit, in the form of fraud, misrepresentation, failure to cooperate, and the like, shall be deemed a breach by said employee or officer which may result in a decision to rescind the agreement to indemnify; and

WHEREAS, by Resolution No. 93-324, adopted October 13, 1993, the City Council adopted a procedure allowing the Department of the Corporation Counsel solely to determine the issue of future indemnification for all City employees and officers; and

WHEREAS, pursuant to Section 1-5.2 of the Revised Ordinances of Honolulu 1990, the City Council desires to repeal in its entirety Resolution No. 93-324; and

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WHEREAS, nothing in this Resolution and in the now-repealed Resolution No. 93-324 shall be construed as a waiver of the City's immunity from punitive damages as established by common law, federal law, state law, or any other law or ordinance; now, therefore,

BE IT RESOLVED by the Council of the City and County of Honolulu that:

(1) Pursuant to Section 1-5.2 of the Revised Ordinances of Honolulu 1990, Resolution No. 93-324 is hereby repealed in its entirety; and

(2) The City shall adopt the following procedure for the determination of the defense and indemnification of City employees and officers:

a) Pursuant to Section 5-203 of the Revised Charter, the Department of the Corporation Counsel shall determine whether a City employee or officer is entitled to a defense to be provided by the City in a lawsuit, unless otherwise provided by federal or state law;

b) The Department of the Corporation Counsel shall determine, on a case-by-case basis, whether a City employee, as defined in Section 13-101.3 of the Revised Charter, shall be entitled to indemnification by the City from any compensatory or punitive damages assessed against such employee in the lawsuit;

c) The City Council, upon recommendation by the Department of the Corporation Counsel, shall determine, on a case-by-case basis, whether a City officer, as defined in Section 13-101.4 of the Revised Charter, shall be entitled to indemnification by the City from any compensatory or punitive damages assessed against such officer in the lawsuit; and

d) For the purposes of this resolution, the City prosecuting attorney shall be treated as a City officer, and notwithstanding (c) above, the City chief of police shall be treated as a City employee;

and

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(3) If a City employee or officer is entitled to a defense and indemnification in the lawsuit, the Department of the Corporation Counsel shall represent said employee or officer in accordance with Section 5-203 of the Revised Charter; and

(4) If a City employee or officer is entitled to a defense provided by the City, but the Department of the Corporation Counsel or the City Council determines that said employee or officer is not necessarily entitled to indemnification by the City, the Department of the Corporation Counsel shall seek the appointment of special counsel for the employee or officer in accordance with Section 5-204.3 of the Revised Charter; and

(5) In all cases where the Department of the Corporation Counsel or the City Council determines that a City employee or officer is entitled to indemnification by the City, the indemnification shall be conditioned on a continuing duty by the employee or officer to reasonably cooperate in good faith with the City in its defense of the lawsuit, the breach of which duty by the employee or officer, in the form of fraud, misrepresentation (including but not limited to misrepresentation of facts and circumstances relied on in the determination of entitlement to indemnification), failure to cooperate, and the like, may result in a decision to rescind the agreement to indemnify; and

(6) No City employee or officer shall be entitled to indemnification by the City unless he or she agrees to the conditions set forth in Section (5) above in a writing satisfactory in form and content to the Department of the Corporation Counsel; and

(7) Nothing in this Resolution and in the now-repealed Resolution No. 93-324 shall be construed as a waiver of the City's immunity from punitive damages as established by common law, federal law, state law, or any other law or ordinance; and

(8) Nothing in this Resolution shall be construed to enlarge the rights of City employees and officers to a defense or indemnification, but only to recognize the discretionary power of the City to indemnify its employees and officers if deemed appropriate by the City.

RESOLUTION

BE IT FINALLY RESOLVED by the Council that the Clerk be and is hereby directed to transmit copies of this resolution to the Corporation Counsel.

INTRODUCED BY:

Gary Gill BR

Councilmembers

DATE OF INTRODUCTION:

NOV 22 1993

Honolulu, Hawaii

(OCS/111693/pn)

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HONOLULU, HAWAII

I hereby certify that the foregoing RESOLUTION was adopted by the COUNCIL OF THE CITY AND COUNTY OF HONOLULU on the date and by the vote indicated to the right.

ATTEST:

Raymond K. Pua
RAYMOND K. PUA
CITY CLERK

Gary Gill
GARY GILL
CHAIR AND PRESIDING OFFICER

Dated DEC 1 1993

ADOPTED MEETING HELD			
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Reference: D 1159

Report No. PO-743

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